Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-539

STATE OF MAINE
Petitioner

v.

ALBERT CHARLES DANA, JR.
and
ALLAN SOCKABASIN
Respondents

RESPONDENT'S BRIEF IN OPPOSITION

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Respondents respectfully pray that the writ of certiorari sought by the petitioner in this case be denied for the following reasons.

QUESTION PRESENTED

In the event that upon remand the Maine Superior Court should decide (1) that the Passamaquoddy Tribe of Indians was a bona fide tribe and was occupying the In-

dian Township Passamaquoddy Reservation in 1790 with "Indian title" rights to it, and (2) that the same tribal and occupancy status existed in 1977, would the United States District Court for the District of Maine have exclusive jurisdiction over the crime of arson committed by Indians within the said reservation pursuant to the Indian Country statute, 18 U.S.C. § 1151 (1976), and the Indian Major Crimes Act, 18 U.S.C. §§ 1153 and 3242 (1976)?

STATEMENT OF THE CASE

In accordance with Sup. Ct. R. 40 (3) concerning inaccuracies and omissions, respondents would point out that the reservation on which the alleged offenses in question took place was not a "state-created reservation," as petitioner maintains (Pet. 3), but a portion of the aboriginal territory of the Passamaquoddy Tribe which the State of Maine has not purported to take and which the Tribe still occupies. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649, 667-68 (D. Me. 1975), *aff'd* 528 F. 2d 370, 373-74 (1st Cir. 1975); Brief for United States, *amicus curiae*, at 12 n. 12, *State v. Dana*, No. WAS—78-3 (Me., July 3, 1979).

ARGUMENT

I. It Is Not Appropriate To Review This Case Now

A. The opinion which petitioners would have this Court review is not final, as the Maine Supreme Judicial Court remanded this action for further factual findings. Pet. 5. Since the matter may be disposed of on other grounds (*See, e.g.* Pet. 3, n. 1), review at this juncture would be inappropriate.

The provision of the Maine code cited by petitioner, ME. REV. STAT. ANN. tit. 15, § 2115-A (Supp. 1978), will not prevent Maine from seeking review of an adverse decision on remand because a dismissal on remand, should one occur, would be based on jurisdictional grounds. Such a decision may be appealed to the Maine Supreme Judicial Court, *State v. Bessey,* 328 A.2d 807 (Me. 1974). If petitioner were again unsuccessful in the Maine Supreme Judicial Court, petitioner could then seek review in this Court of the issues presented in the instant petition and any other appropriate issues which might be revealed by a complete record.[1]

B. The decision of the Maine Supreme Judicial Court has not created a barrier to the effective administration of criminal justice in Maine as petitioner suggests. While petitioner's reference to the dismissals in *State v. Holmes,* No. CR 79-113 (Penobscot County Super. Ct., Me, Aug. 31, 1979), and other cases implies that on-reservation offenders are not being brought to justice, this is not the case. The defendant in *Holmes*, for example, was indicted by the United States shortly after the State charges against him were dismissed. The United States Justice Department, the Department of the Interior, the Passamaquoddy Tribe and the Penobscot Nation treat the three Indian reservations in Maine as Indian country and handle criminal matters accordingly.

These federal prosecutions provide an opportunity for ultimate discretionary review of this issue by this Court, if appropriate, as the federal courts necessarily have to determine their jurisdiction over such matters.

C. The pendency of certain Indian land claims is not cause for granting review in this case. Although petitioner

[1]Even if there were no appeal to the Maine Supreme Judicial Court, the matter would still be reviewable after remand by this Court as a final decision of the state court system. 28 U.S.C. § 1257 (1976). Marino v. Ragen, 332 U.S. 561 (1947).

would link the case at bar to such claims, no one has suggested anywhere that lands which are merely the subject of an Indian claim are for that reason "Indian country" for purposes of 18 U.S.C. § 1153 (1976). In fact, the decision below specifically requires actual tribal possession as a condition for "Indian country" status. And while the court below followed the decision of this Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), in holding that 25 U.S.C. § 177 (1976) (a statute which is involved in the claims referred to by petitioner) applies within the State of Maine, Pet. A16, n. 8; A17-A21,[2] the court below specifically refrained from attempting to answer questions relating to the Maine Indian land claims. In particular, the court below refrained from dealing with the question left unresolved in *Oneida*:

[2]*Accord,* The New York Indians, 72 U.S. (5 Wall.) 761, 771 (1866); Bottomly v. Passamaquoddy Tribe, 599 F. 2d 1061, 1064-5 (1st Cir. 1979).

The validity of these decisions is also demonstrated by the language of the Nonintercourse Acts themselves, which uniformly protect, without geographic restriction, all tribes of Indians. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137; Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729. Moreover, the 1793, 1796, 1799 and 1802 versions of the Trade and Intercourse Acts contained an exception which excluded Indians who resided "within the ordinary jurisdiction of the individual states" *and* who were "surrounded by settlements of the citizens of the United States." Act of March 1, 1793, ch. 19, § 13, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 19, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 19, 1 Stat. 743; Act of March 30, 1802, ch. 13, § 19, 2 Stat. 139. If none of the provisions of the Trade and Intercourse Acts applied anywhere within the ordinary jurisdiction of the states, as petitioner contends, this exception would not have been needed. Mashpee Tribe v. New Seabury, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd on other grounds*, 592 F. 2d 575 (1st Cir. 1979), *cert denied* S. Ct. No. 79-61, 48 U.S.L.W. 3221 (Oct. 2, 1979).

Although this citizens settlement exception was not included in the 1834 version of the Trade and Intercourse Act, that Act included a floor amendment submitted by Senator Frelinghuysen of New Jersey, which provided that repeal of the 1802 Act would not "impair or affect the Intercourse Act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi." Act of June 30, 1834, ch. 161, § 29, 4 Stat. 729.

whether a tribe suing under § 177 can actually prove the facts necessary to recover possession of the lands which it claims. Pet. A25, n. 11; *Oneida, supra*, 414 U.S. at 676.

For these reasons, the Indian land claims referred to by petitioner would only become relevant to the case at bar after a tribe had actually recovered possession of land, or after lands had been returned to a tribe as part of a negotiated settlement. If the former situation occurs, there will be adequate opportunity for review by this Court of both the jurisdictional and the claims issues involved. If the latter situation occurs, the jurisdictional issues will undoubtedly be dealt with in discussions leading to the negotiated settlement.

Indeed, this is precisely what happened in the settlement of the claims of the Narragansett Tribe in Rhode Island, in which the Narragansett Tribe was given the right to reoccupy 1900 acres of its former aboriginal territory. The jurisdictional aspects of that transfer were the subject of detailed negotiations between the Narragansett Tribe and the State of Rhode Island, and the agreement reached between the parties on these issues was adopted verbatim by Congress when it passed the legislation implementing the settlement. 25 U.S.C. § 1708 (Supp. 1979).

Practically all of the remaining claims, including, most notably, those of the Passamaquoddy Tribe and the Penobscot Nation in Maine, are currently the subject of settlement negotiations. Although the proposed settlement of the Maine claims does not call for a contribution from the State of Maine of either land or money, the State, through counsel for petitioner here, is currently involved in negotiations with the Maine tribes concerning the jurisdictional status of both the lands to be returned to tribal possession and the lands currently in tribal possession. Thus while the Maine Indian land claim is not legally related to the case at bar, because the parties to the land

claim negotiations have also chosen to discuss the jurisdictional status of the Indian Township Passamaquoddy Reservation, the land claims negotiations may moot the issues presented for review.

II. The Decision Below Was Correct

The Maine Supreme Judicial Court considered in depth the decisions of this Court in interpreting the meaning of the term "Indian country" in federal law, including this Court's most recent decision in *United States v. John*, 437 U.S. 634 (1978), Pet. A6-A17. Petitioner presents no basis for disputing the validity of the opinion below.

A. In addition to the statutory grounds stated in the decision below for concluding that the Indian Township Passamaquoddy Reservation is federally protected against alienation, that reservation is also protected because it consists of lands in which an American Indian tribe has unextinguished aboriginal title. Such interests have been protected by federal common law since the founding of this country. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974). *Accord, Wilson v. Omaha Indian Tribe,* S. Ct. Nos. 78-160, 79-161, at 9, 15, 47 U.S.L.W. 4758, at 4760, 4762 (June 20, 1979); *United States v. Wheeler,* 435 U.S. 313, 326 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

B. The conclusion of the Maine Supreme Judicial Court is not in conflict with *Wilson v. Omaha Indian Tribe, supra*. Petitioner suggests that *Wilson* stands for the proposition that 25 U.S.C. § 177 (1976) is not applicable within a state. But this Court held to the contrary in *Oneida Indian Nation v. County of Oneida, supra*, and the fact that *Oneida* is cited with approval in *Wilson* eight times strongly suggests that the Court views the two cases as consistent.

Moreover, the case at bar involves the Major Crime Act, which was first passed in 1885, eleven years after Congress deleted the 1834 "Indian country" definition referred to in *Wilson*. *United States v. John, supra*. As originally enacted, the Major Crimes Act did not even mention "Indian country," but applied "within the boundaries of any state in the United States, and within the limits of any Indian reservation." *See United States v. John, supra*. The term of place for the Major Crimes Act did not become "Indian country" until 1948, when Congress adopted a new definition for the term which clearly included lands within states. See 18 U.S.C. § 1151(b) (1976), which includes "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, *and whether within or without the limits of the State. . . .*"

Nor is *Wilson* inconsistent with the Maine Supreme Judicial Court's conclusions concerning the geographic scope of § 177. The decision below concerned itself with the applicability of the 1790 version of § 177 and the 1977 version of that statute, Pet. A22. As pointed out above, section 1 of the 1834 Trade and Intercourse Act, the provision which was discussed in *Wilson*, was not adopted until 1834 and was deleted in 1874.

C. The Maine Supreme Judicial Court did not ignore, as petitioner suggests, decisions of this Court concerning the status of Indian groups in Maine. The court below specifically and correctly noted that neither *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852), nor the decision in *Moor v. Veazie*, 32 Me. 343 (1850), determined the status of any Maine tribe. Pet. A18-A19. The other authorities cited by petitioner, the concurring opinions of Mr. Justice MacLean in *Elk v. Wilkins*, 112 U.S. 94, 107-8 (1884), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832), and the concurring opinions of Mr. Justice Johnson in

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 73 (1831), and *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), are inapposite because they merely stand for the proposition that federal Indian laws which relate to tribes do not protect Indian groups once they cease to exist as tribes.

D. The decision of the Maine Supreme Judicial Court does not violate the political question doctrine. The Court in *United States v. Sandoval*, 231 U.S. 28 (1931), did not hold, as petitioner suggests, that the existence of federal protections for particular Indians involves a non-justiciable political question, but rather said that the courts are obliged to show great deference where the political branches have decided to provide protections for a particular group of Indians. *Id.* at 46. This notion has been subsequently refined to reflect the flexible modern attitude toward the political question doctrine. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 82, 84-86 (1977); *Baker v. Carr*, 369 U.S. 186, 215-17 (1962). The decision below provides for the requisite degree of deference. Pet. A24-A25.

Furthermore, it is highly peculiar to suggest that a criminal case cannot be reviewed by the Maine Supreme Judicial Court because of the existence of an alleged political question. As the court below noted, this Court has long exercised its constitutional duty to interpret the criminal laws which Congress has enacted for the governance of Indian country. Pet. A6-A17.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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